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Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights

Summary

The present report presents the concepts of implementing and monitoring human rights with specific reference to economic, social and cultural rights. Section II addresses the specific challenges posed by the complex array of obligations that stem from economic, social and cultural rights, including progressive realization and non-discrimination. Section III outlines various ways of monitoring legislation and other normative measures, such as regulations, policies, plans and programmes, and elaborates on monitoring the realization of rights, paying particular attention to human rights impact assessments, the use of indicators and benchmarks and budget analysis. It also addresses the issue of monitoring violations of economic, social and cultural rights.

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I. Introduction

1. The present report, submitted pursuant to General Assembly resolution 48/141, focuses on the implementation and monitoring of economic, social and cultural rights. It complements three previous reports to the Economic and Social Council (E/2006/86, E/2007/82 and E/2008/76), which addressed, respectively, the issues of legal protection of economic, social and cultural rights, the concept of "progressive realization", and the application of the principle of equality between men and women and the prohibition of discrimination against women in respect of their economic, social and cultural rights.

II. General overview of implementation and monitoring of economic, social and cultural rights

A. Concepts

2. The concepts of implementation and monitoring are deeply entrenched in the core international human rights instruments covering economic, social and cultural rights. According to article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, each State party is required:

> "to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

3. Implementation is the act of putting into effect a decision, or providing practical means to accomplish something. In the context of international human rights law, this means moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations.

4. As for monitoring, assessing compliance with any human rights obligation requires gathering and evaluating information. The spirit of the periodic State party reporting system under every core international human rights treaty clearly reflects this need: it requires State parties to produce reports about "the measures which they have adopted and the progress made in achieving the observance"[1] of the rights at stake, and it entrusts treaty bodies with considering those reports in order to evaluate performance by States.

5. Monitoring has two important defining features. Firstly, it is a continuous activity that systematically uses information in order to measure the achievement of

[1] Article 16 of International Covenant on Economic, Social and Cultural Rights. The wording is substantively similar to equivalent provisions in other international human rights instruments, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, article 9; the International Covenant on Civil and Political Rights, article 40; Convention on the Elimination of All Forms of Discrimination against Women, article 18; the Convention on the Rights of the Child, article 44; the Convention on the Rights of Persons with Disabilities article 35, paragraph 1.

defined targets and objectives within a specified time frame. Secondly, it provides feedback on the implementation process and on implementation problems.[2] In the context of the present report, targets and objectives are those set by international human rights obligations; monitoring is thus understood as a systematic gathering of information with a view to evaluating compliance with human rights commitments.

6. The present report will address some specific monitoring needs and challenges, stemming from the nature of the obligations created by economic, social and cultural rights. International law itself underlines the importance of monitoring in the field of human rights as it establishes under all core international human rights treaties bodies of experts tasked to monitor the implementation of the obligations embodied in each treaty. Furthermore, soft law instruments, including "general comments",[3] have explicitly underscored the importance of monitoring in the field of economic, social and cultural rights.[4] Some general comments even consider that the obligation to monitor progress towards the full realization of a right is part of the minimum core content of that right.[5]

7. Monitoring can have different purposes and can be carried out by different actors. Accordingly, the scope and methods of monitoring vary, depending on what is the intended purpose and on who is conducting it. The present report primarily addresses monitoring by various State party actors, including different State branches and agencies, such as ministries, national human rights institutions and the judiciary, for different purposes. The monitoring techniques and methods suggested in the report may also be relevant for civil society organizations, treaty bodies and other stakeholders.

8. Implementation and monitoring are deeply intertwined. Implementation involves both process and outcome: measures adopted and results achieved. Monitoring is needed to assess whether measures are adopted and applied and whether they are appropriate, but also to evaluate their results. Monitoring provides feedback for implementation: the evaluation of measures adopted and results achieved constitutes valuable information either to confirm the direction of some specific steps, or to correct them when necessary.

B. Types of obligation

9. Economic, social and cultural rights are recognized in several international human rights instruments. In addition to the International Covenant on Economic, Social and Cultural Rights, such rights are also recognized in other core treaties, including the Convention on the Elimination of All Forms of Discrimination against

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[2] See J. Valadez and M. Bamberger (eds.), *Monitoring and Evaluating Social Programs in Developing Countries: a Handbook for Policymakers, Managers, and Researchers*, EDI Development Studies (Washington, D.C., The World Bank, 1994).

[3] For a compilation of the general comments adopted by the Committee on Economic, Social and Cultural Rights, see document HRI/GEN/1/Rev. 9 (Vol. 1).

[4] See, for example, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Council of the Food and Agriculture Organization of the United Nations, November 2004), guideline 17 addresses "Monitoring, indicators and benchmarks". See also Committee on Economic, Social and Cultural Rights, general comment No. 4, para. 13, and general comment No. 12, para. 31, among others.

[5] See, for example, Committee on Economic, Social and Cultural Rights general comment No. 14, para. 43 (f) and general comment No. 19, para. 59 (f).

Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the International Convention on the Elimination of All Forms of Racial Discrimination.

Obligations to respect, protect and fulfil

10. Economic, social and cultural rights, like all human rights, entail both negative and positive obligations for the State party. In some cases, States must refrain from certain behaviour (a negative obligation), for example to avoid taking measures that would prevent access to food by right holders. In other cases, a State must take measures to provide for the realization of human rights (a positive obligation), such as measures to ensure access to universal, compulsory and free primary education.

11. The Committee on Economic, Social and Cultural Rights makes a distinction between obligations to respect, protect and fulfil. Obligations to respect require States to refrain from unduly interfering with the enjoyment of a right. For example, they should not create obstacles to the formation of trade unions or impede the use of their language by minorities. Obligations to protect require States to prevent, deter, stop or impose sanctions on third parties when they are unduly interfering in the enjoyment of a right. For example, States should regulate the activities of employers and private providers of water and sanitation services. Obligations to fulfil require States to facilitate, provide or promote the enjoyment of a right when the right holders, for reasons that are beyond their willingness or capacity, cannot do so. For example, States should establish a social security system and implement food aid schemes or programmes when individuals or groups of individuals cannot secure food for reasons beyond their willingness or capacity. This tripartite typology underlines the multidimensional nature of human rights in general, and of economic, social and cultural rights in particular.

Obligations of "immediate effect" and of taking measures towards "progressive realization"

12. An important feature that makes monitoring essential for economic, social and cultural rights is the notion of progressive realization. Not all of the obligations regarding economic, social and cultural rights, however, are qualified by the notion of progressive realization. Some obligations, such as the obligation to take steps towards realization, the prohibition of discrimination and the satisfaction of minimum core obligations, are of immediate effect. All rights may also include immediately enforceable aspects. For example, the right to adequate housing entails an immediate obligation to protect from forced eviction.

13. Therefore, while not all aspects of economic, social and cultural rights are subject to progressive realization, the framers of the Covenant acknowledged that progress towards the full realization of rights would in many cases be gradual and dependent on available resources. Thus, in a world of innumerable needs and limited resources, States have a margin within which they may determine the use of their resources and prioritize some demands over others. It is conceivable that there may be situations where economic, social and cultural rights are not fully realized for all, and yet the State is not in breach of its international obligations. For example, the State could discharge its duties regarding the right to housing if it has complied with minimum core obligations, including the provision of shelter for homeless people

and protection against forced eviction, and it is devoting the maximum of its available resources to ensure reasonable housing solutions, even if not everyone is ensured long-term security of tenure.

14. The notion of progressive realization requires progress, that is, improvement over time. States need to undertake deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of the rights enshrined in the Covenant.[6] Monitoring progressive realization would therefore entail comparisons over time, to evaluate whether there was progress, stagnation or retrogression. One of the objectives of the periodic review of State reports by treaty bodies is to compare over time the evolution of the degree of normative recognition and effective enjoyment of the rights recognized in the respective instruments. The need for this comparison is even more explicit when an international human rights instrument has included a specific obligation of progressive realization.

15. The obligation to progressively realize economic, social and cultural rights also entails a related prohibition of deliberate retrogression. This means that it is prohibited to adopt measures aimed at reducing the level of protection that some rights have already gained. The restriction or limitation of rights that have already been provided for (such as access to free primary health-care services for children) or the abrogation of legislation necessary to exercise a right, are examples of deliberate retrogressive measures, which are considered by the Committee on Economic, Social and Cultural Rights a prima facie violation of the Covenant unless the State can show that it is fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[7]

16. The obligation to realize progressively the rights enshrined in the Covenant applies beyond the achievement of the minimum essential levels of each of the rights.[8] A key provision of the International Covenant on Economic, Social and Cultural Rights, article 11, paragraph 1, captures this idea when it recognizes a right to an adequate standard of living "and to the continuous improvement of living conditions". This wording explicitly underscores the duty to achieve sustained progress in the effective enjoyment of aspects necessary to live a dignified life, such as food, health, housing, clothing, water and sanitation.

Obligation to guarantee non-discrimination

17. An important obligation enshrined in all core international human rights treaties is the prohibition of discrimination in relation to all human rights. According to article 2, paragraph 2, of the Covenant, States parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised

[6] See Committee on Economic, Social and Cultural Rights general comment No. 3, para. 2.

[7] See, inter alia Committee on Economic, Social and Cultural Rights general comment No. 3, para. 9, general comment No. 12, para. 19, and general comment No. 14, paras. 32, 48 and 50. Some domestic courts have applied the prohibition of retrogression as a constitutional review standard. See, for example, Constitutional Court of Portugal, Decision No. 39/84, 11 April 1984.

[8] On the notion of "minimum core content" or "minimum core obligations", see Committee on Economic, Social and Cultural Rights general comment No. 3, para. 10, general comment No. 13, para. 57, and general comment No. 19, para. 59, and report of the High Commissioner for Human Rights, E/2007/82, paras. 20-22.

without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[9] Similar provisions are included in other relevant human rights instruments enshrining economic, social and cultural rights. This list of factors, or "forbidden grounds of discrimination", is, however, not exhaustive — as the use of the expression "other status" suggests. There could be other relevant grounds to consider. The Committee on Economic, Social and Cultural Rights has mentioned, for example, disability, geographical residence, health status and sexual orientation as grounds that would also require a strict scrutiny if employed to make distinctions with the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of rights set forth by the Covenant.

18. The prohibition of discrimination imposes on States both negative and positive obligations. This means, on the one hand, a prohibition against engaging in discrimination, that is, against making de jure or de facto distinctions that have the intention or the effect of denying or restricting rights on the basis of any forbidden grounds. For example, States are not allowed to introduce differences in social security regimes or to establish restrictions in access to reproductive health information or education on the basis of religion, age or national origin.[10] On the other hand, the positive duty obliges the State party to eradicate existing discriminatory laws and practices, not only in respect of relations between individuals and the State, but also in respect of the market and in the private sphere — that is, in the relations between private individuals. For example, the State should prevent and punish discrimination in private workplaces.[11]

19. In order to comply with these obligations, the State needs to detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them, and ensure the adequate application of such measures both to itself and to private parties.

C. Implications of different types of obligation for implementation and monitoring of economic, social and cultural rights

20. The State is under an obligation to adopt measures to overcome situations where right holders are not enjoying their rights. Implementation means, in this context, the adoption of concrete measures — including legislative, administrative, financial and other kinds of measures — that would allow rights holders to enjoy their rights.

21. Similarly, a State is obliged to detect threats by its own agents or third parties to the enjoyment of the rights, and to prevent or counteract those threats. Implementation means, in this context, the adoption of adequate regulations, the provision of proper resources to oversee the conduct of State agents and third parties

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[9] See Committee on Economic, Social and Cultural Rights, forty-second session, general comment No. 20: non-discrimination in economic, social and cultural rights (art. 2, para. 2) (E/C.12/GC/20).

[10] See, for example, Human Rights Committee, *Zwaan-de Vries v. the Netherlands*, Communication 182/1984, views of 9 April 1987.

[11] See, for example, Committee on the Elimination of Racial Discrimination, *Ylimaz Dogman v. the Netherlands*, Communication 1/1984 (29 September 1988).

(such as labour or education inspectorates) and the effective imposition of sanctions where needed.

22. Implementation of economic, social and cultural rights implies transformative action oriented towards ensuring the full enjoyment of rights, or preventive action to prevent a potential violation or a remedial action to offer redress when rights have been violated. Monitoring implementation is an indispensable means to assess whether these required types of action are actually taking place and are sufficient, or are absent. Failure to adopt adequate transformative or preventive action may amount to a violation of the rights at stake.

23. States are also obliged to refrain from acting in a way that threatens or undermines the actual state of enjoyment of rights by right holders. In this context, monitoring requires the verification as to whether the State is not weakening or putting at risk, through its actions, the already consolidated link between right holders and their rights. For example, it is important to monitor the potential negative impact of proposed legislative or policy measures -- such as the effects of development-based projects on the right to housing or the effects of decentralization of services on the right to education.

24. Evaluating the obligation of progressive realization requires monitoring to measure achievements, detect failures, gaps and retrogression, and reorient State action when needed. The Committee on Economic, Social and Cultural Rights has emphasized that monitoring is indeed an integral and indispensable aspect of a State party's obligations under the Covenant.[12] Implementation of measures to achieve the realization of economic, social and cultural rights should be seen as a process, rather than as a distinct event. The concepts of "progressive realization" and of "continual improvement of living conditions" suggest that it is an open-ended process. Therefore, the need to monitor the realization of economic, social and cultural rights remains continuous for all States regardless of their level of development.

25. Monitoring is particularly relevant to identifying discriminatory laws, policies, programmes and practices, with a view to their eradication, an assessment of their outcomes and impacts, or their revision and reorientation. The eradication of discrimination against marginalized and excluded groups requires special attention to assess the difficulties that they have in enjoying certain rights. Monitoring gaps in the enjoyment of rights by certain groups requires, in turn, the collection of disaggregated data. The Committee on Economic, Social and Cultural Rights has stressed the importance of the disaggregation of data and its systematic updating, as an indispensable means for identifying gaps in the enjoyment of economic, social and cultural rights, and in order to design adequate corrective measures.[13]

26. Data can be disaggregated by innumerable factors. While it would be ideal to disaggregate data by all possible grounds of discrimination, this is not always possible. Notwithstanding, States should make efforts to disaggregate data at least by age, gender, relevant demographic group (e.g., ethnicity, language, religion or

[12] See Committee on Economic, Social and Cultural Rights general comment No. 14, para. 43 (f); general comment No. 15, para. 37 (g); and general comment No. 19, para. 59 (f).

[13] See Committee on Economic, Social and Cultural Rights general comment No. 13, para. 37 and general comment No. 19, para. 75.

migrant status), socio-economic status and geographical factors (urban/rural populations and territorial divisions).

III. Monitoring approaches and methods

A. Monitoring legislation and normative institutional frameworks

27. Legislative measures are considered in the International Covenant on Economic, Social and Cultural Rights as being particularly appropriate for giving effect to economic, social and cultural rights. Several Committee on Economic, Social and Cultural Rights general comments have emphasized the crucial role of legislation in ensuring the enjoyment of different rights.[14] Giving content to rights through publicly known, general and objective rules is a fundamental aspect of the rule of law.

28. Normative measures to put into practice economic, social and cultural rights are not restricted to legislation or administrative regulations as such. Policies, plans of action and programmes also define State commitment and obligations and complement legislation and regulations by defining policy principles and goals, resources, target groups, time lines and lines of action.

29. Monitoring legislation and normative frameworks usually includes two kinds of questions. The first is whether legislative and other necessary normative measures have been actually adopted. Failure to adopt legislation and necessary normative measures to realize economic, social and cultural rights amounts to a violation of international human rights obligations by omission. For example, it may be insufficient to include the right to food in a constitution if no secondary legislation and regulations are adopted to give a concrete content to the right, identify the duty bearers and provide remedial mechanisms in case of violation.

30. Once legislation and other normative measures have been adopted, the question is whether they comply with international human rights standards. At least two kinds of shortcoming could be envisaged. The first is the incompatibility of domestic legislation and other normative measures with those standards, because of the infringement of a prohibition. For example, legislation that restricts the rights of a group on the basis of forbidden factors is in breach of the prohibition of discrimination, and thus incompatible with international human rights law. Domestic and international courts and quasi-judicial bodies have considered such kind of violations regarding different economic, social and cultural rights.[15]

31. The second consideration is the possible inadequacy of legislation and other normative measures. Inadequate or inappropriate legislative and normative measures

[14] See Committee on Economic, Social and Cultural Rights general comment No. 14, paras. 35, 36 and 56; general comment No. 15, paras. 23, 26 and 50; general comment No. 16, paras. 19, 24 and 30; general comment No. 18, paras. 10, 18, 22, 24, 25 and 38; and general comment No. 19, paras. 45, 46, 48, 51, 67 and 72.

[15] See, for example, Constitutional Court of South Africa, *Khosa and others v. Minister of Social Development and others*, 2001 (1) SA 46 (CC), 4 March 2004; United States Supreme Court, *Brown v. Board of Education of Topeka*, 347 US 483 (1954); Corte de Apelaciones (Court of Appeals) of Guatemala acting as *amparo* tribunal, Third chamber, Amparo No. 46-2003 Of. 1., 30 October 2003.

are those failing to meet a required standard. This may mean that legislation and other normative measures can be considered as partially adequate, but do not take into consideration all relevant elements.

32. International human rights standards require States to include in legislative and normative measures a specific substantive content. Some components of the concept of "minimum core content" are good examples of substantive requirements; for example, the right to health requires the State "to provide essential drugs",[16] and the right to education requires the State "to provide primary education for all".[17] If no provision is made in this respect in the legislative and normative framework, States may not have complied with their duty legally to ensure these core aspects of the respective rights. Similarly, legislative and other policy measures should be appropriate and reasonable, that is, adequate instruments to achieve the goals they have the purpose to serve. Legislation and policy measures in the field of economic, social and cultural rights have been found inadequate or unreasonable, for example, when they failed to consider the situation of the most vulnerable or marginalized groups being unjustifiably excluded from certain treatments under a health plan, or when they were considerably insufficient to cover the demands they aimed to provide for.[18]

33. There are also procedural requirements prescribed by international human rights standards. The institutional framework and the procedures to implement economic, social and cultural rights should include mechanisms for the participation of the relevant stakeholders, ensure access to information and transparency, establish accountability mechanisms, respect due process in decision-making, and provide remedies in case of violations. Failure to duly include mechanisms to satisfy these procedural requirements may also amount to violations of international obligations.[19]

B. Monitoring the realization of economic, social and cultural rights

34. The adoption of legislation, regulations, policies, plans and programmes does not amount automatically to the realization of economic, social and cultural rights. Realization requires action to translate the specific commitments included in legislation and other normative instruments into reality. It is thus important to develop tools to assess the appropriateness of the measures adopted by the State to implement rights, as well as the achieved results. Monitoring realization requires tools that are capable of measuring results and progress over time. There are a number of available techniques that facilitate such an evaluation.

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[16] See Committee on Economic, Social and Cultural Rights, general comment No. 14, para. 43 (d).

[17] See Committee on Economic, Social and Cultural Rights, general comment No. 13, para. 57.

[18] See Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), 4 October 2000; Supreme Court of Argentina, *Asociación de Esclerosis Múltiple de Salta v. Ministerio de Salud s/amparo*, 1 June 2003; and European Committee of Social Rights, *International Association Autism-Europe v. France*, Complaint 13/2002, decision on the merits of 7 November 2003.

[19] See, for example, Constitutional Court of Colombia, Decision C-030/08, 23 January 2008; and European Committee of Social Rights, *European Federation of National Organisations Working with the Homeless v. France*, Complaint 39/2006, decision on the merits of 4 February 2008.

Human rights impact assessments

35. Impact assessments are evaluations used to predict the future consequences of proposed policies, programmes and projects in order to address shortcomings before they are adopted or implemented. They can also be conducted to assess whether a certain policy, programme or project had the intended positive impact or whether the impact was negative. Therefore, impact assessments are conducted before the adoption of policies, programmes or projects take place, or after they have been implemented. Specifically, human rights impact assessments seek to aid Governments in choosing between alternatives, making modifications, and providing for mitigating measures in order to respect, protect and fulfil human rights. Human rights impact assessment help Governments to adopt and implement policies, programmes and projects that will best meet their obligations to take deliberate and concrete steps towards progressive realization of human rights.[20] Human rights treaty bodies have recommended that States parties conduct human rights impact assessments in relation to their treaty obligations, including economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights, for example, has recommended that human rights impact assessments "be made an integral part of every proposed piece of legislation or policy initiative on a basis analogous to environmental impact assessments or statement" (E/C.12/1/Add.19, para. 33; see also CRC/C/15/Add.114, para. 13).

36. While the concept of a human rights impact assessment is relatively recent, other kinds of impact assessment have been carried out in different areas. For example, environmental impact assessments and social impact analyses are well-established practices and extensive literature discusses various approaches and methodologies. These can provide useful guidance when developing techniques for conducting human rights impact assessments.

37. The need to adjust the methodology of an impact assessment to the nature of the proposed measure, to take explicitly into consideration the human rights obligations at stake and to ensure the participation of all the relevant stakeholders is crucial.[21] Even if it is not possible to prescribe a single model for conducting human rights impact assessments, some practical steps to be considered, inspired by other kinds of impact assessment, are: (a) carrying out a preliminary check to determine the need for the assessment; (b) preparing an assessment plan, which should involve all the relevant stakeholders and provide them with the necessary information about the proposed measures and specific details of the rights and obligations at stake; (c) collecting the relevant information from the stakeholders; (d) performing a rights analysis by comparing the information collected with the relevant human rights obligations of the State; (e) circulating the draft analysis of the rights to all stakeholders and debating alternatives with them; and (f) making the final decisions,

[20] See P. Hunt and G. MacNaughton, "Impact assessments, poverty and human rights: a case study using the right to the highest attainable standard of health", Health and Human Rights Working Paper Series No. 6 (World Health Organization, May 2006). For a comprehensive review of the issue, see G. de Beco, "Human rights impact assessment", Netherlands Quarterly of Human Rights, vol. 27, No. 2 (2009).

[21] See, for example, Humanist Committee for Human Rights, Health Rights of Women Assessment Instrument (2006); and International Centre for Human Rights and Democratic Development, *Initiative on Human Rights and Impact Assessment* (2005).

adopting policy measures according to the assessment and establishing mechanisms to evaluate the policy implementation and results.[22]

38. The Women's Global Network for Reproductive Rights offers a good example of the use of human rights impact assessments. That organization conducted an assessment to analyse the impact on women's right to health of a draft bill on obstetric care for undocumented pregnant migrants in the Netherlands. The purpose of the proposed legislation was to create a more uniform compensation system, but the proposed measures had the effect of reducing access to health facilities for undocumented pregnant migrants and compromising access to prenatal health care. The bill also created disparities between groups of users of medical services.[23]

Use of indicators and benchmarks for monitoring

39. Indicators and benchmarks are important ways to monitor progress, stagnation or retrogression in the realization of a given right over a certain period of time, for example the period between the consideration of two successive periodic reports by a treaty body.

40. Since the report of the High Commissioner for Human Rights on progressive realization of economic, social and cultural rights was issued (E/2007/82), the Office of the United Nations High Commissioner for Human Rights has made progress in developing a conceptual framework of qualitative and quantitative human rights indicators, including illustrative indicators for selected economic, social and cultural rights — the right to food, the right to health, the right to education, the right to adequate housing, the right to social security and the right to work (see HRI/MC/2008/3, annex I).

41. The selection of appropriate indicators for each right will facilitate the use of benchmarks as a concrete yardstick to assess progress. Benchmarks constitute concrete values of given quantitative indicators, which are used as targets or measurable goals that States parties commit themselves to achieve in a given period of time; for example, to reduce the incidence of maternal mortality or school drop-out rates. Benchmarks can help State parties in designing the appropriate measures and apportioning the necessary resources and they offer better parameters to monitor the adequacy of the State's efforts to realize rights.

42. Consistent monitoring through the use of indicators and benchmarks allows progress in realizing economic, social and cultural rights to be measured with a more accurate set of conceptual tools. The use of indicators and benchmarks improves the effectiveness of international monitoring by treaty bodies and can enhance the capacity of States parties to assess and improve the results of policies, plans and programmes. The adoption of a consistent set of indicators and public commitment to attaining some measurable benchmarks, enhance the transparency and accountability of State policies vis-à-vis civil society and other national and international stakeholders. The use of statistical information acknowledged by the State constitutes a possible source of evidence in court settings and has a key

[22] See P. Hunt and G. MacNaughton, op. cit., pp. 37-46.

[23] See A. Wubben, "Violations of human rights in the Netherlands: HeRWAI analysis on the consequences of the implementation of the draft bill, modification Health Care Insurance Law (31 249), on the access to obstetrician care for uninsured and undocumented pregnant migrants in Amsterdam (Amsterdam Women's Global Network for Reproductive Rights, 2008).

function in litigation in certain areas, such as indirect discrimination and so-called structural litigation.

43. Using statistical information to monitor human rights requires States to produce information aimed specifically at monitoring compliance with human rights obligations. In addition, in order to allow monitoring by civil society organizations and other stakeholders, information produced by the State should be publicly accessible.[24] While the use of indicators is a useful tool, it has certain limitations. Problems such as lack of information, difficulties with respect to disaggregation of data and the risk of understanding only a limited part of the picture of rights fulfilment call for combining indicators with other sources of information to assess the realization of economic, social and cultural rights.

Budget analysis

44. This section of the report presents considerations on the use of budgetary analysis as a tool for monitoring the realization of economic, social and cultural rights, complementing the earlier report of the High Commissioner for Human Rights on progressive realization (E/2007/82).

45. The International Covenant on Economic, Social and Cultural Rights, in its article 2, paragraph 1, requires a State party to take steps "to the maximum of its available resources" to achieve the full realization of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has underscored that "appropriate measures" to achieve such full realization include "financial" measures.[25]

46. As for all human rights, achieving economic, social and cultural rights requires budget allocations and corresponding expenditures, in particular in regard to the positive obligations that they entail. The provision of educational services, the promotion and facilitation of the enjoyment of the right to food, the monitoring of the duties of employers regarding workers' rights, for instance, necessarily require financial resources, sustainable over time. Therefore, the budget — as the instrument that determines the extent of the State's resources, their allocation and prospective expenditures — is particularly relevant for the realization of economic, social and cultural rights. The budget is a useful source of information to evaluate which normative commitments are taken seriously by the State, because it provides a demonstration of the State's preferences, priorities and trade-offs in spending. For example, low apportionments in health care, education or social programmes when there are visible implementation gaps could show inadequate prioritization or insufficient estimation of the required funds to realize economic, social and cultural rights.

47. There are different ways to conduct budget analysis, depending on the objective.[26]

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[24] See, for example, Inter-American Court of Human Rights, *Claude-Reyes v. Chile*, 19 September 2006, para. 77.

[25] See Committee on Economic, Social and Cultural Rights general comment No. 3, para. 7.

[26] See, generally, Fundar — Centro de Análisis e Investigación, International Human Rights Internship Program and International Budget Project (2004).

48. Firstly, budget analysis can be static or dynamic. Static analysis evaluates a given budget by itself. Dynamic analysis compares the evolution of budgets over time, looking at variations in allocations and spending over different periods.

49. Static analysis provides direct information about the resources available for States to carry out their mandates. A second, relatively simple step in the static analysis of budgets from the perspective of economic, social and cultural rights consists in identifying the allocation of resources for each specific right as provided for in different sectors, in comparison with the totality of resources; this distribution by itself offers an interesting means for comparison and evaluation. Mapping the allocation of resources for social security, health or food policies and comparing them with the percentage of other allocations gives a general sense of the relative Government priorities expressed through the budget.

50. Breaking up the resource allocation in each specific area also offers an important indication about what are the priorities. Economic, social and cultural rights require special attention for vulnerable, marginalized and discriminated groups. One possible approach to budget analysis consists of mapping the main beneficiaries of some budget allocations. For example, when systems and services that satisfy economic, social and cultural rights — such as the health or the educational systems — are segmented, and each segment serves different sections of the population, comparing how resources are distributed may be revealing. If a significant percentage of the education budget is allocated to subsidizing private schools that cater for children from middle and high-income families compared with public schools serving low-income sectors of the population, the analysis would suggest that the Government's priorities may not be in line with its international obligations.

51. Some civil society groups and United Nations organizations have developed specific methodologies to analyse budget implications for particular social groups, such as women or children.[27] Similarly, geographic disaggregation of allocations, in comparison with the resources and needs of each area, can also inform arguments about inadequate distribution.

52. Such approaches can be made sharper by comparing allocations in each area with specific recommendations or benchmarks linked to identifying a lack of realization of rights. Recommendations or benchmarks can be expressed in terms of resources, for example, how much would it cost to achieve a specific goal such as reducing the percentage of children out of school or extending the coverage of the health system to remote areas. This technique, sometimes called "costing out", offers a parameter to test both the adequacy of the resources that have been apportioned by the State and their distribution, and may reveal the need to resort to additional resources, such as new taxes or international assistance and cooperation, in order to achieve proposed benchmarks.

53. Budget analysis may sometimes prove to be a challenging exercise, as economic, social and cultural rights as such are not necessarily broken down within the State budget lines. Furthermore, funds allocated for other rights can be related to or have an impact on economic, social and cultural ones. For example, birth

[27] See, for example, United Nations Development Fund for Women, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, New York, 2006.

registration is a civil right that also relates to the enjoyment of all rights, including health, social welfare and education.

54. Dynamic budgetary analysis offers other ways to evaluate efforts to implement obligations regarding economic, social and cultural rights. A simple but important distinction in dynamic short-term budgetary analysis is the difference between budgeted spending and actual spending: comparing spending with budgetary provisions offers an important tool to evaluate State commitment to realizing economic, social and cultural rights. For instance, underspending in an area where some targets have not been met or in instances when indicators show significant gaps in the full realization of economic, social and cultural rights, may indicate a lack of compliance with the obligation to take steps "to the maximum of [a State's] available resources". Similarly, consistent underspending in one social sector, such as education or health, over a number of years may actually indicate that planning is inadequate or that funds for the sector are not released promptly, rendering it impossible to use the allocated resources in time.

C. Monitoring violations of economic, social and cultural rights

55. A different but related perspective to monitoring realization of rights is that of monitoring violations. As do any other human rights, economic, social and cultural rights create legal obligations for States and non-compliance with those obligations amounts to violation of the rights. Individuals and groups of individuals can be victims of such violations.

56. While monitoring the realization of rights requires the assessment of a continual process, monitoring violations is usually linked with recording and documenting specific events. The former tends to be conducted through the analysis of socio-economic and other administrative statistics, while the latter is often related to event-based data (see HRI/MC/2008/3, paras. 13 and 14). This distinction requires some qualification.

57. Firstly, socio-economic and other administrative statistics may be useful or even essential to describe a violation accurately. For example, claims of indirect discrimination require proof of a detrimental, disparate impact on the enjoyment of a right on a specific group in comparison with another group, such as women in relation to men or members of an ethnic minority in relation to the majority of the population. Statistics and quantitative information may also be employed to describe other violations, such as the inadequacy of education, the systematic character of forced evictions, or failure to adopt measures to implement legal obligations. They can also be useful to prove that the State has not complied with its duties, despite the existence of available resources.

58. Secondly, not all violations can be accurately characterized as "events": since economic, social and cultural rights entail both negative and positive obligations, violations can take the form of State actions, but can also occur by inaction or omission. In these cases, the term "event-based data" can be misleading, because the violation consists of a failure to act, such as failure to implement a food policy or to establish a labour inspectorate to monitor compliance with safety and health regulations in workplaces.

59. A further distinction can also clarify different types of violation through State action. A State can breach a human rights obligation when adopting legislation or regulations that are incompatible with human rights standards. These are normative violations. An example would be the adoption of legislation that is discriminatory or that is deliberately retrogressive without adequate justification. A State can also breach a human rights obligation by action when not complying in fact with an existing prohibition: these are factual violations. This would be the case, for example, if State agents were to discriminate in the provision of social services in contravention of existing anti-discrimination legislation. In either case, documenting violations by action in the case of economic, social and cultural rights is not substantively different from the traditional documentation of violation of civil and political rights.

60. Obligations to respect economic, social and cultural rights are usually described as prohibitions on interference with the current enjoyment of a right by the right holder, and their breach can offer good examples of violations of the right by State action. For instance, forced evictions, discriminatory exclusion from health services, the adoption of legislation restricting the right to form and join trade unions without proper justification or pollution of water by State agents are illustrative examples of such violations. The adoption of deliberate, retrogressive measures, such as legislative measures reducing the coverage of mandatory health plans or reintroducing fees for primary schools are also concrete examples of such measures.

61. Violations by omission can be either normative violations or factual violations. Normative omissions, also called "legal gaps", occur, for instance, when there is an obligation to enact legislation or regulations to give effect to a right and the obligation is not complied with. Legal gaps are especially relevant in the field of economic, social and cultural rights, because the effective enjoyment of rights depends to a great extent on the clear definition of legal entitlements and obligations. In many countries in the world, while the constitution and ratified human rights treaties prescribe a duty to ensure economic, social and cultural rights, no legislation has been adopted to translate them into concrete entitlements. Factual omissions or "implementation gaps" consist of non-compliance with a mandate to do something that is already provided by law, such as providing medication, ensuring sufficient school places for children or effectively monitoring compliance with safety and health regulations by private employers. There exists a need to improve techniques of documentation of violations by omission, which will benefit the monitoring of all human rights.

62. Another issue to consider is violations that have a collective or systemic effect. Compliance with positive obligations regarding economic, social and cultural rights often requires collective arrangements, solutions or remedies. Reasons of cost and scale determine the need to plan services and programmes taking into consideration groups or collectives, not only isolated individuals. For example, the right to have access to educational or medical services cannot be conceived as a right to one teacher per student, or one physician per patient, but as a right to have access to facilities and services that cater for a certain segment of the population.

63. In other words, fulfilment of some aspects of individual rights is a function of a collective arrangement. When adequate facilities and services do not exist, or when they fail to deliver adequately, all the members of the group that they should

serve are affected by such shortcomings. For example, the lack of provision of an adequate number of places in primary school in a certain district affects all the children that should benefit from the schools. An inadequate number of health-care personnel at health centres affects the entire group of users of those facilities. Inadequate sanitation or water services have an impact on the enjoyment of all users. In these cases, providing adequate remedies even for individual violations usually involves collective decisions, capable of addressing the root cause of the breach.

64. One common way to monitor violations of economic, social and cultural rights is by keeping a record of the complaints filed by alleged victims before relevant judicial or quasi-judicial complaints mechanisms, such as court cases and complaints before national human rights institutions or administrative bodies. While in some jurisdictions economic, social and cultural rights are still not considered justiciable and adequate remedies for alleged breaches of these rights have not been provided, failure to provide such adequate remedies may itself amount to a violation of international obligations regarding economic, social and cultural rights.[28]

65. A growing amount of national case law in the field of economic, social and cultural rights has shown the potential of courts and quasi-judicial bodies to detect violations, reveal shortcomings in the design or implementation of public policies and offer redress to victims.

66. Often, violations of economic, social and cultural rights are intertwined with violations of the right to an adequate remedy and to a fair trial. Moreover, due compliance with judicial orders in the field of economic, social and cultural rights is particularly important because of the vital interests and pressing circumstances that the violation of such rights involves. Domestic and international courts and quasi-judicial bodies have stressed the importance of speedy procedures and timely compliance with court decisions related to wages, pensions, work-related injuries, medical interventions, school enrolment and forced evictions, among others. Monitoring the adequacy and effectiveness of judicial remedies in the field of economic, social and cultural rights will also offer an important indication of the degree to which the State honours its obligations regarding these rights.

67. Litigation in the field of economic, social and cultural rights has highlighted the need to extend monitoring to the implementation of court orders. In cases where the required remedy is complex and may entail the modification of laws, regulations and plans or provision of new services or new budgetary allocations, the implementation of court orders can take a long time. A number of emblematic cases from different jurisdictions illustrate the specific requirements of complex or structural litigation in the field of economic, social and cultural rights. Interestingly, these challenges have led to new procedural developments, such as appointing court commissioners, assigning monitoring functions to national human rights institutions,

[28] See Committee on Economic, Social and Cultural Rights general comment No. 9, paras. 2-8, 10 and 14. See also Inter-American Commission on Human Rights, "Access to justice as a guarantee of economic, social and cultural rights: a review of the standards adopted by the inter-American system of human rights", OEA/Ser.L/V/II.129, Doc. 4, 7 September 2007.

or developing specific indicators for the political branches to report on progress in the implementation of judicial orders to the courts.[29]

68. The adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights represents a groundbreaking step. It will offer the possibility to individuals and groups of individuals under the jurisdiction of State parties to both the Covenant and the Optional Protocol to submit to the Committee on Economic, Social and Cultural Rights communications on alleged violations of any of the rights set forth by the Covenant, given certain conditions, including the exhaustion of domestic remedies. It also allows the Committee to initiate inquiries when it receives reliable information of grave and systematic violation by a State party of any of the rights recognized by the Covenant, provided that the concerned State has explicitly accepted this competence. Once in force, the Optional Protocol will help to define the content of the rights in concrete situations and further support the development of national case law.

69. Documenting and making public violations of economic, social and cultural rights — especially those violations that have a collective impact — can be important tools for prompting a response from the responsible authorities. Civil society organizations and national human rights institutions play a fundamental role in such work of documentation and public discussion, as does the media. Some institutional mechanisms, such as inquiries conducted by parliamentary committees or independent agencies, also offer opportunities for monitoring violations.

IV. Conclusions

70. The present report offers some guidance concerning the relevance of implementation and monitoring in the area of economic, social and cultural rights. While implementation and monitoring are important for all human rights, some special characteristics of economic, social and cultural rights benefit from specific clarification. These include the spectrum of obligations stemming from economic, social and cultural rights, the concept of "progressive realization" and the obligation to strictly guarantee non-discrimination in the enjoyment of those rights.

71. The report reviews different ways of monitoring economic, social and cultural rights. Monitoring the legislation and the normative framework adopted to implement economic, social and cultural rights requires assessing whether legislation and other normative measures have been adopted to give effect to these rights and whether they comply with the substantive and procedural obligations required by international human rights law.

72. Monitoring realization of economic, social and cultural rights can also be achieved through assessing progress, stagnation or retrogression in the full enjoyment of those rights over time. This could be done through human rights impact assessments in order to foresee the possible consequences of adopting and implementing specific measures on economic, social and cultural rights. Human

[29] See, for example, Constitutional Court of Colombia, Decision A-027/2007, 1 February 2007; Supreme Court of India, *People's Union for Civil Liberties v. Union of India and others*, 2 May 2003; and Federal Administrative Court of Argentina, Chamber IV (Cámara Nacional en lo Contencioso Administrativo Federal, Sala IV), *Viceconte, Mariela Cecilia c/Estado Nacional, Ministerio de Salud y Acción Social*, 2 June 1998.

rights impact assessments require consultation among and the participation of all the relevant stakeholders.

73. Another method to monitor progressive realization is the use of quantitative indicators and benchmarks. The development of a framework of indicators and the adoption of illustrative indicators have considerably advanced over the past years.

74. The report also proposes an analysis of budgets, which represent an indispensable instrument for the realization of economic, social and cultural rights, but also an important showcase for a State's policy choices and priorities. Budget analysis can be useful to assess if the State's commitments are adequately translated into practice through its allocation of resources and expenditure. Budget analysis offers ways to investigate what is "the maximum of the available resources" of a particular State party.

75. Finally, the report also addresses monitoring violations of economic, social and cultural rights. Such violations can occur by State action or omission. Monitoring violations of economic, social and cultural rights can be achieved through recording complaints filed before judicial and quasi-judicial mechanisms. In State parties where the possibility of submitting complaints is limited or non-existent, civil society organizations and other stakeholders usually document violations, especially those with a collective impact. The entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights will strengthen monitoring of violations at the international level.